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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

TURECAMO OF SAVANNAH, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the Maritime Commercial Instruments and Liens Act, 46 U.S.C. 31301 *et seq.*, prohibits a cause of action against the United States to enforce a maritime lien against a public vessel under 46 U.S.C. 31342 (Supp. V 1993).

PARTIES TO THE PROCEEDINGS

The United States was the appellant in the proceeding below and respondent Turecamo of Savannah, Inc., was the appellee.

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TURECAMO OF SAVANNAH, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 36 F.3d 1083. The opinion of the district court (App., *infra*, 15a-27a) is reported at 824 F. Supp. 1069.

JURISDICTION

The court of appeals entered its judgment on November 1, 1994, and denied a petition for rehearing on June 30, 1995. App., *infra*, 28a-29a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Maritime Commercial Instruments and Liens Act (46 U.S.C. 31301 *et seq.*), the Suits in Admiralty Act of 1920 (46 U.S.C. App. 741 *et seq.*), and the Public Vessels Act of 1925 (46 U.S.C. App. 781 *et seq.*), are *reprinted at* App., *infra*, 31a-33a.

STATEMENT

This case concerns whether the Maritime Commercial Instruments and Liens Act, 46 U.S.C. 31301 *et seq.* (MCILA), prohibits a cause of action against the United States to enforce a maritime lien against a public vessel under 46 U.S.C. 31342 (Supp. V 1993). The court of appeals held such a cause of action to be permissible. The court believed itself bound to follow its prior decision in *Bonanni Ship Supply, Inc.* v. *United States*, 959 F.2d 1558 (11th Cir. 1992), which held that a maritime lien against a public vessel is authorized under Section 31342 and can be enforced through an *in personam* action in which *in rem* principles apply. In doing so, the court of appeals acknowledged that the *Bonanni* ruling appeared to be contrary to the express intent of Congress. In *Bonanni* itself, the court of appeals recognized that, in enacting the MCILA, Congress clearly intended to prohibit maritime lien actions against the United States. The *Bonanni* panel ruled otherwise on the basis of circuit precedent that predated the MCILA.

1. In 1988, Congress enacted the Maritime Commercial Instruments and Liens Act, 46 U.S.C. 31301 *et seq.* (MCILA), as part of its ongoing revision and consolidation of United States maritime laws. Sections 31341 and 31342 were enacted to replace the Federal Maritime Lien Act of 1920, 46 U.S.C. App. 971 *et seq.* (Supp. V 1987) (MLA), which was repealed

effective January 1, 1989, when the MCILA went into effect. Act of Nov. 23, 1988, Pub. L. No. 100-710, § 107, 102 Stat. 4752.

Prior to enactment of the MCILA, the MLA governed causes of action based on maritime liens against public and private vessels. The MLA had been enacted in 1920 to provide a maritime lien, and a cause of action to enforce the lien, to persons who furnished repairs, towage or other "necessaries" to a vessel. The MLA did not distinguish between private vessels and vessels owned by the United States:

> Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

Act of June 5, 1920, ch. 250, § 30, subsec. P, 41 Stat. 1005, formerly codified at 46 U.S.C. App. 971 (Supp. V 1987).

The MLA specified that the maritime lien it created could be enforced through an *in rem* action against the vessel to which the services had been provided. 41 Stat. 1005. Such *in rem* actions were limited to suits against private vessels because *in rem* actions against United States vessels were not included within Congress's waiver of sovereign immunity for admiralty actions. In light of the Suits in Admiralty Act of 1920, 46 U.S.C. App. 741 *et seq.*, and the Public Vessels Act of 1925, 46 U.S.C. App. 781 *et seq.*, the MLA had been interpreted to permit only

actions *in personam* against the United States that could proceed based on *in rem* principles, except that no United States vessel could be arrested or seized. *Stevens Technical Services, Inc.* v. *United States*, 913 F.2d 1521 (11th Cir. 1990).

In 1988, Congress repealed the MLA and replaced it with the MCILA, which explicitly exempted public vessels[1] from its maritime lien provision. As enacted in 1988, the MCILA provided, in relevant part:

> **§ 31342. Establishing maritime liens**
>
> A person providing necessaries to a vessel (*except a public vessel*) on the order of a person listed in section 31341 of this title or a person authorized by the owner—
>
> (1) has a maritime lien on the vessel;
>
> (2) may bring a civil action in rem to enforce the lien; and
>
> (3) is not required to allege or prove in the action that credit was given to the vessel.

Act of Nov. 23, 1988, Pub. L. No. 100-710, § 102(c), 102 Stat. 4748, formerly codified at 46 U.S.C. 31342 (1988) (emphasis added).

In 1989, Congress amended Section 31342 to make the explicit public vessel exemption even clearer. Congress replaced the parenthetical in the first clause of Section 31342 with a new and separate subsection (b) that exempts public vessels from

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[1] The MCILA defines "public vessel" to mean "a vessel that is owned, demise chartered, or operated by the United States Government or a government of a foreign country." 46 U.S.C. 30101(3).

Section 31342. Section 31342, as amended in 1989, thus now provides:

> **§ 31342. Establishing maritime liens**
>
> (a) *Except as provided in subsection (b) of this section*, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner—
>
> (1) has a maritime lien on the vessel;
>
> (2) may bring a civil action in rem to enforce the lien; and
>
> (3) is not required to allege or prove in the action that credit was given to the vessel.
>
> (b) *This section does not apply to a public vessel.*

46 U.S.C. 31342 (Supp. V 1993) (emphasis added).

2. a. Respondent Turecamo of Savannah, Inc., is a Georgia corporation engaged in the business of towing oceangoing and other vessels. In the fall of 1990, the United States sought to have a vessel it owned, the *YFNB-33 Seacon*, towed from Mayport, Florida, to the United States naval facility in Portsmouth, Virginia. The Department of Defense, Military Traffic Management Command, entered into a contract of carriage with Panocean Marine, Inc. (PMI). PMI, through its subsidiary Project Logistics & Transportation, Inc., contracted with Turecamo for the services of Turecamo's tugboat, the *Cynthia Turecamo*, to perform the tow. The United States knew of, and approved, the use of the *Cynthia Turecamo*, which then towed the *Seacon* from Mayport to Portsmouth. App., *infra*, 3a.

The United States paid PMI in full. Gov't C.A. Br. 11. Turecamo submitted an invoice to Project Logisitics for $55,800, but was paid only $20,800. App., *infra*, 3a.

Turecamo thereafter brought this action in the United States District Court for the Southern District of Georgia against the United States, as owner of the *Seacon*, to recover the balance of $35,000. Turecamo alleged that it had a maritime lien against the *Seacon* because it had provided "necessaries" to the *Seacon* within the meaning of Section 31342, and therefore had an *in personam* action based on *in rem* principles against the United States under 46 U.S.C. App. 742, 743. Respondent filed a motion for summary judgment contending that it was entitled to judgment because the district court was bound by *Bonanni Ship Supply, Inc.* v. *United States*, 959 F.2d 1558 (11th Cir. 1992), *Marine Coatings of Alabama, Inc.* v. *United States*, 932 F.2d 1370 (11th Cir. 1991), and *Stevens Technical Services, Inc.* v. *United States*, 913 F.2d 1521 (11th Cir. 1990), in which the Eleventh Circuit had held that a maritime lien against a public vessel can arise under the MLA and the MCILA and can be enforced through an *in personam* action based on *in rem* principles.[2]

The United States asserted that respondent failed to state a claim upon which relief could be granted and that the court lacked subject matter jurisdiction over the suit by reason of Section 31342(b) of the MCILA.

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[2] Respondent apparently did not seek to recover the unpaid balance from PMI and Project Logistics through a contract action. Nor did respondent attempt to establish contractual privity with the government or pursue contractual remedies against it. Gov't C.A. Br. 11.

Gov't Ans. 2. The United States did not dispute the material facts alleged,[3] but opposed summary judgment on the basis of the express exemption of public vessels from the coverage of Section 31342. The United States also relied on the legislative history of the MCILA as confirming Congress's intention to prohibit maritime liens against public vessels regardless of whether such liens were enforced through *in personam* or *in rem* proceedings. Opp. to Mot. for Summ. J. 3-5, also citing *ITO Corp.* v. *United States*, 1990 WL 129200, 1990 A.M.C. 1439 (S.D. Tex. 1990). The government recognized that *Bonanni* supported respondent's position, but pointed out that *Bonanni* relied on *Stevens Technical* and *Marine Coatings*, which were decided under the MCILA's predecessor statute, the MLA. These cases could not be reconciled with the text or background of the MCILA and, in any event, were wrongly decided. Opp. to Mot. for Summ. J. 6.

The district court adhered to the court of appeals' holding in *Bonanni* that "the MCILA 'does not preclude the imposition of maritime liens on public vessels where an admiralty plaintiff sues the United States *in personam* on principles of *in rem* liability.'" App., *infra*, 17a, quoting *Bonanni*, 959 F.2d at 1564. The district court recounted the evolution of Eleventh Circuit case law leading up to *Bonanni*. The district court explained that, in *Stevens*

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[3] The parties do not dispute that the towing service provided by Turecamo was a "necessary" within the meaning of the MCILA, that the government approved the use of Turecamo's tugboat to perform the service, and that the government accepted the towed vessel upon delivery. App., *infra*, 25a-26a.

Technical, the court of appeals held that a subcontractor who had provided necessaries to a public vessel was granted a maritime lien against the public vessel by the MLA, 46 U.S.C. App. 971-973 (Supp. V 1987) (repealed 1988), and could enforce it through an *in personam* action against the government based on *in rem* principles of liability. App., *infra*, 23a. The *Stevens Technical* court held that such an action was not barred by a provision of the Public Vessels Act of 1925 (PVA), 46 U.S.C. App. 788, that refuses to recognize liens against public vessels, or by a provision of the Suits in Admiralty Act of 1920 (SAA), 46 U.S.C. App. 741, that prohibits the arrest or seizure of any United States vessel. App., *infra*, 22a-23a. In *Marine Coatings*, the court of appeals reaffirmed its *Stevens Technical* ruling that the SAA and the PVA do not bar enforcement of maritime liens against public vessels under the MLA. *Id.* at 23a-24a.

The district court observed that, after repeal of the MLA in 1988 and enactment of the MCILA, the Eleventh Circuit in *Bonanni* addressed whether the *Stevens Technical/Marine Coatings* rationale still applied in light of the explicit provision in the MCILA stating that its maritime lien provision does not apply to public vessels. 46 U.S.C. 31342 (Supp. V 1993). The *Bonanni* court relied on an excerpt from the 1988 legislative history of the MCILA that stated that Section 31342 "ma[de] no substantive change to law," and did not supersede the PVA, the Foreign Sovereign Immunities Act of 1976, or the SAA, "on bringing an *in rem* action against a public vessel." App., *infra*, 24a-25a, quoting *Bonanni*, 959 F.2d at 1562; H.R. Rep. No. 918, 100th Cong., 2d Sess. 48 (1988). The *Bonanni* court reasoned that, because Congress did not intend to alter the substantive

rights of parties through enactment of the MCILA, the court was still bound to apply the interpretation of preexisting law set forth in *Stevens Technical* and *Marine Coatings*.

The district court granted respondent summary judgment, notwithstanding the fact that respondent "acknowledges that the existence of a maritime lien against a public vessel under the MCILA is expressly prohibited." App., *infra*, 17a. The court emphasized that the government had presented "persuasive evidence that, arguably, Congress' intent was to ensure that a lien against a public vessel be foreclosed," and that, "[i]f the law of this jurisdiction is incorrect, it is for the United States Supreme Court or the Eleventh Circuit, *en banc*, to so state." *Id.* at 27a.

b. The court of appeals affirmed on the ground that it, like the district court, was bound to follow *Bonanni*. The panel analyzed the flawed reasoning underlying *Bonanni*, however, and suggested that the court of appeals reconsider *Bonanni en banc*. App., *infra*, 1a-14a.[4] The panel listed five reasons why *Bonanni* should be reconsidered:

(1) The *Bonanni* panel relied on a statement in the legislative history of Section 31342 indicating that the Section "makes no substantive change in the law," without realizing that the statement was

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[4] The United States sought initial hearing of this case *en banc* to consider the overruling of *Bonanni*, but the court of appeals denied that request. App., *infra*, 30a. At the request of the panel, oral argument focused on whether the issue presented merited *en banc* review. The parties submitted supplemental letter briefs addressing the question. *Id.* at 11a n.7.

written at a time before the public vessel exemption was added to Section 31342. App., *infra*, 11a-12a, citing H.R. Rep. No. 918, *supra*, at 8. The panel indicated that "[p]erhaps the [*Bonanni*] panel would have reached a different result" if this fact had been brought to its attention. App., *infra*, 12a.

(2) Although the MCILA generally was intended to codify existing maritime law, the 1988 legislative report also indicated that the MCILA "does in fact make a great many substantive changes to the present law." App., *infra*, 12a, quoting H.R. Rep. No. 918, *supra*, at 15.

(3) When Congress amended the MCILA in 1989, it emphasized its intent that "a claim may not be brought either in *personam* or in *rem* on a maritime lien theory against a public vessel." App., *infra*, 12a, quoting 135 Cong. Rec. 30,803 (1989).

(4) The *Bonanni* panel itself recognized that Congress intended to codify a prohibition against both *in personam* and *in rem* actions asserting maritime liens against public vessels. App., *infra*, 12a-13a & n.9. The *Bonanni* panel should not have second-guessed Congress's view as to what the law was prior to enactment of the MCILA because Congress expressly stated what it intended the MCILA to accomplish. Congress's intent, even if based on an erroneous interpretation of prior law, should govern because "the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was." *Id.* at 13a, quoting *Brown* v. *GSA*, 425 U.S. 820, 828 (1976).[5]

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[5] The panel below pointed out that, even if Congress's view of the law as it existed before the MCILA was incorrect,

(5) Regardless of the correctness of Congress's interpretation of existing law at the time it enacted the MCILA, when Congress amended the MCILA in 1989, it made clear its intent that "a claim may not be brought either in *personam* or in *rem* on a maritime lien theory against a public vessel." App., *infra*, 13a-14a, citing 135 Cong. Rec. 30,803 (1989); *id.* at H9183 (daily ed. Nov. 20, 1989); *id.* at H9184 (daily ed. Nov. 20, 1989).

The United States filed a petition for rehearing *en banc* on November 21, 1994. The court of appeals denied the petition on June 30, 1995. App., *infra*, 28a-29a.

REASONS FOR GRANTING THE PETITION

The court of appeals erred in holding that the Maritime Commercial Instruments and Liens Act, 46 U.S.C. 31301 *et seq.* (MCILA), permits enforcement of a maritime lien against a public vessel under 46 U.S.C. 31342 (Supp. V 1993) so long as the suit is an *in personam* action against the United States. The

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Congress's interpretation was a reasonable one. App., *infra*, 13a. When Congress expressed its view of the law at the time of its 1988 enactment of the MCILA, the Eleventh Circuit case law construing pre-MCILA law did not exist. The *Stevens Technical* and *Marine Coatings* cases were both decided after the enactment of the MCILA although both involved application of pre-MCILA law. At the time Congress enacted the MCILA, the only decision casting doubt on the inapplicability of maritime liens to public vessels was *Canadian Aviator, Ltd.* v. *United States*, 324 U.S. 215 (1945), which involved a tort claim for negligence. In addition, one year before enactment of the MCILA, a federal district court had held that the PVA prohibited liens against public vessels. See *River & Offshore Servs. Co.* v. *United States*, 651 F. Supp. 276, 281 (E.D. La. 1987).

United States would thereby be subject to double liability whenever it pays its contractor in full but where the contractor does not, in turn, pay a subcontractor. Under the court of appeals' decision, the United States would be held liable for payment to the subcontractor under a maritime lien despite the absence of any contractual or tort liability. The plain language, structure, and history of the MCILA evidence Congress's intent to prohibit maritime liens against public vessels, whether enforceable through *in personam* or *in rem* proceedings.

The ruling by the court below rests entirely on Eleventh Circuit precedent, *Bonanni Ship Supply, Inc.* v. *United States*, 959 F.2d 1558 (1992), that was wrongly decided. Neither the panel of the court of appeals nor the district court in this case indicated agreement with the reasoning underlying *Bonanni*. Indeed, both courts recognized the existence of persuasive arguments that *Bonanni* should be overruled.

The *Bonanni* panel itself expressed dissatisfaction with its decision, which it believed to be compelled by circuit precedent. The *Bonanni* panel acknowledged that its decision appeared contrary to the clear and expressed intent of Congress to exempt public vessels from maritime liens. By interpreting the MCILA according to the Eleventh Circuit's pre-MCILA precedents, instead of Congress's language and evident intent, we believe that the *Bonanni* court disregarded the well-established principle that "the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what [Congress's] perception of the state of the law was." *Brown* v. *GSA*, 425 U.S. 820, 828 (1976); *Cannon* v. *University of Chicago*, 441 U.S. 677, 710-711 (1979).

In view of the clarity of the relevant statutory language, the Court may wish to consider summary reversal. The court of appeals' failure to rehear this case or *Bonanni en banc*, despite suggestions to do so by the panel opinions in both cases, indicates that action by this Court is the only remaining judicial avenue available to vindicate Congress's intent. The issue is an important one. The potential for maritime lien liability under the MCILA created by the Eleventh Circuit extends to contracts for supplies, service, and repairs on more than 1,000 public vessels involving millions of dollars annually.

1. The MCILA establishes a cause of action for a maritime lien against a vessel in favor of a party that provides "necessaries" to the vessel. 46 U.S.C. 31342(a) (1) (Supp. V 1993). The statute also authorizes an *in rem* action to enforce the lien. 46 U.S.C. 31342(a)(2) (Supp. V 1993); see *Farwest Steel Corp.* v. *Barge Sea-Span*, 828 F.2d 522, 524 (9th Cir. 1987), cert. denied, 485 U.S. 1034 (1988); *Jan C. Uiterwyk Co.* v. *MV Mare Arabico*, 459 F. Supp. 1325, 1328 (D. Md. 1978). Section 31342 does not, however, establish a cause of action on a maritime lien against a *public* vessel; on the contrary, it expressly and unambiguously excludes public vessels from its coverage.

Subsection (b) of Section 31342 thus states that "[t]his section does not apply to a public vessel." 46 U.S.C. 31342(b) (Supp. V 1993). That exemption applies to all of Section 31342, including the clause that creates the maritime lien cause of action. The text of the statute provides:

> (a) *Except as provided in subsection (b) of this section*, a person providing necessaries to a vessel

on the order of the owner or a person authorized by the owner—

(1) has a maritime lien on the vessel;

(2) may bring a civil action in rem to enforce the lien; and

(3) is not required to allege or prove in the action that credit was given to the vessel.

(b) *This section does not apply to a public vessel.*

46 U.S.C. 31342 (Supp. V 1993) (emphasis added). Thus, there is no maritime lien available under Section 31342 against a public vessel and no *in rem* principle of liability upon which to base an action against the United States.

The text and history of Section 31342 as initially enacted in 1988, as well as the history of the 1989 amendment, confirm that Congress intended to exempt public vessels from maritime liens, whether enforceable through *in rem* or *in personam* suits. The original version of Section 31342 in the 1988 bill did not include any exemption for public vessels. See H.R. Rep. No. 918, *supra*, at 8. In a letter to the House of Representatives, responding to a request for its views on the House bill, the Department of Justice expressed concern about the proposed Section 31342 for that reason. The Department asserted that Section 31342 should be amended to include language explicitly exempting public vessels from maritime liens. The Department explained that the amendment was needed to "ensure that no claim for maritime liens could be asserted against public vessels * * * for any reason." H.R. Rep. No. 918, *supra*, at 56. Congress thereafter modified Section 31342 accordingly, and, as enacted in 1988, it provided:

§ 31342. Establishing maritime liens

A person providing necessaries to a vessel (except a public vessel) on the order of a person listed in section 31341 of this title or a person authorized by the owner—

(1) has a maritime lien on the vessel;

(2) may bring a civil action in rem to enforce the lien; and

(3) is not required to allege or prove in the action that credit was given to the vessel.

Act of Nov. 23, 1988, Pub. L. No. 100-710, § 102(c), 102 Stat. 4748.

The current version of Section 31342 came into being as a result of a technical amendment the following year intended to make the public vessel exemption even clearer. Congress replaced the parenthetical in the first clause of Section 31342 with a new and separate subsection (b) that exempts public vessels from Section 31342. One of the sponsors of the legislation explained the reason behind the 1989 amendment:

> [W]e have clarified provisions relating to maritime liens against public vessels. Although I felt that we had taken care of any uncertainty last year, we have rewritten section 31342 to clarify once and for all the fact that *a claim may not be brought either in personal [sic] or in rem on a maritime lien theory against a public vessel.*

135 Cong. Rec. H9184 (daily ed. Nov. 20, 1989) (emphasis added). Another sponsor of the measure explained that:

> Section 31342 has been rewritten by deleting the parenthetical provisions relating to excluding

> public vessels from the application of the existing law and replacing it with a new subsection (b) to assure clarity. This is not a substantive change but simply makes more explicit the long established rule of law prohibiting maritime liens against public vessels. It further clarifies the existing law *that a claim may not be brought either in personam or in rem on a maritime lien theory against a public vessel.*

Id. at 30,803 (1989) (emphasis added); see *id.* at H9183 (daily ed. Nov. 20, 1989).

2. The decision below is based on the Eleventh Circuit's erroneous interpretation of the MCILA in *Bonanni Ship Supply, Inc.* v. *United States*, 959 F.2d 1558 (1992). In *Bonanni*, the court of appeals concluded that it was compelled to interpret the MCILA in the same manner as it had interpreted the MCILA's predecessor statute, the MLA. In two decisions, the circuit had interpreted the MLA to permit a cause of action for a maritime lien against a public vessel so long as the action proceeded *in personam* based on *in rem* principles and did not involve the arrest or seizure of a public vessel. *Marine Coatings of Alabama, Inc.* v. *United States*, 932 F.2d 1370 (11th Cir. 1991); *Stevens Technical Services, Inc.* v. *United States*, 913 F.2d 1521 (11th Cir. 1990). The court reached this conclusion in *Bonanni* despite the fact that it conflicted with the plain language of the public vessel exemption in Section 31342 and the evident congressional intent.[6]

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[6] The *Bonanni* panel recognized that its decision appeared to be inconsistent with congressional intent: "Given the clear desire of Congress to exempt public vessels from coverage under the maritime lien provisions of the MCILA, * * *

a. The *Bonanni* court misconstrued Congress's intent in enacting Section 31342 by relying on an incomplete reading of the legislative history of the 1988 enactment of the MCILA. The court's analysis hinged on a statement in the committee report that Section 31342 "ma[de] no substantive change to law." 959 F.2d at 1562-1563, quoting H.R. Rep. No. 918, *supra*, at 48. That committee report addressed an early version of Section 31342 that differed substantially in relevant respects from the version that was ultimately enacted. The early version that is the subject of the report was couched in terms similar to the predecessor statute, the MLA, and, like the MLA, it did not exclude or even mention public vessels. See H.R. Rep. No. 918, *supra*, at 8. As described above, the public vessel exemption was added later at the suggestion of the Department of Justice. Thus, the report's statement that Section 31342 did not make any substantive changes in the law did not refer to the public vessel exemption that was later added to Section 31342. The court of appeals in the present case recognized that the *Bonanni* court seemed not to realize that that statement was written at a time before the public vessel exemption was added to Section 31342, and suggested that "[p]erhaps the [*Bonanni*] panel would have reached a different

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reconsideration of the rule announced in *Stevens Technical* and *Marine Coatings* by this court en banc may be in order." 959 F.2d at 1564 n.11. One panel member concurred only in the result in *Bonanni*. See *id.* at 1565. The United States did not seek review by this Court of the interpretational error in *Bonanni* because the government prevailed on other grounds. See *id.* at 1564-1565.

result" if this fact had been brought to its attention. App., *infra*, 12a.

The *Bonanni* court relied on a misreading of the legislative history of the MCILA to reach a conclusion contrary to the plain text of the statute despite the fact that the committee report upon which it relied anticipated and attempted to prevent just this type of analysis. In discussing the fact that the 1988 legislation was part of an ongoing revision and codification of federal maritime law, the committee noted that although the bill, "as introduced, purported to make no substantive change in the law," the bill, as reported, "in fact ma[de] a great many substantive changes to the present law." H.R. Rep. No. 918, *supra*, at 15. The committee then explained, in terms equally applicable to textual changes made in later versions of the bill, that

> [t]he Committee intends and hopes that the interpretation of the laws as codified and enacted by this bill will be based on the language [of] the bill itself. The bill, as reported, is based on that premise. There should, therefore, be little or no occasion to refer to the statutes being repealed to interpret the provisions of this bill.
>
> The Committee also feels, as the courts have held, that the literal language of the statute should control the disposition of the cases. There is no mandate in logic or case laws for reliance on legislative history to reach a result contrary to the plain meaning of the statute, particularly where that plain meaning is in no way unreasonable.

Id. at 15-16.

Congress's intent is also evident from the 1989 statutory amendment. Congress acted in 1989 to clarify what was perceived to be ambiguity in the 1988 Act regarding maritime liens against public vessels. As set forth more fully above, sponsors of the legislation stated that the amendment was to clarify "once and for all" the fact that a claim may not be brought either *in personam* or *in rem* on a maritime lien theory against a public vessel. 135 Cong. Rec. H9184 (daily ed. Nov. 20, 1989); *id.* at H9183 (daily ed. Nov. 20, 1989) (amendment "further clarifies the existing law that a claim may not be brought either in personam or in rem on a maritime lien theory against a public vessel"); *id.* at 30,803.

b. The *Bonanni* panel also erred when it chose to follow circuit precedent regarding the meaning of a predecessor statute, rather than the text and evident purpose of the new statute. The *Bonanni* panel recognized that the Eleventh Circuit's prior decisions appeared to differ from Congress's understanding of the meaning of the MLA at the time it enacted the MCILA. Under Eleventh Circuit precedent, the MLA was interpreted to allow *in personam* suits against the United States based on *in rem* principles. See *Stevens Technical Services, Inc.* v. *United States*, 913 F.2d 1521 (11th Cir. 1990); *Marine Coatings of Alabama, Inc.* v. *United States*, 932 F.2d 1370 (11th Cir. 1991). The *Bonanni* panel understood that the legislative history of the MCILA suggested that Congress did not agree with that interpretation. The *Bonanni* court nonetheless adhered to its own precedents which had "rejected the very rule that Congress had perceived to be in force when it enacted the MCILA." 959 F.2d at 1563. The court's application of that case law, instead of

Congress's evident understanding and intent, contravened the well-established principle that, when interpreting a federal statute and Congress's reference at the time of enactment to earlier law, "the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what [Congress's] perception of the state of the law was." *Brown*, 425 U.S. at 828; *Cannon*, 441 U.S. at 710-711.

c. The *Bonanni* panel's reasoning also renders the 1988 addition of the public vessel exemption and the 1989 amendment meaningless. It has been undisputed for over 70 years that a claimant may not bring an *in rem* maritime lien action against a public vessel. See *Canadian Aviator, Ltd.* v. *United States*, 324 U.S. 215, 219-220 (1945). The United States has not waived its sovereign immunity from such suits. See 46 U.S.C. App. 742, 788. Under the *Bonanni* panel's reasoning, Congress changed the text of the maritime lien statute—not once, but twice—simply to codify a rule that already existed.

All the district courts, but one, that have addressed the issue in this case have rejected the *Bonanni* reasoning. *Hopeman Bros., Inc.* v. *USNS Concord*, No. Civ. A. 2:95CV91, 1995 WL 548453, at *2 (E.D. Va. Sept. 6, 1995) (finding *Bonanni* "not convincing" and concluding that "Section 31342 could not be more unambiguous" in not allowing imposition of a maritime lien against a public vessel); *Sipco Services & Marine, Inc.* v. *Bethlehem Steel Corp.*, 892 F. Supp. 129, 130 (D. Md. 1995) (declaring that "*Bonanni* is entirely unsound" and concluding that "*Bonanni*'s reed is insufficient support for the assertion of a lien against the United States"); *E.J. Bartells Co.* v. *Northwest Marine, Inc.*, 1994 WL 476189, 1994 A.M.C. 1057, 1059 (W.D. Wash. 1994) (MCILA "eliminated the

maritime claim which could hang on the SAA or PVA hooks"); *Pactherm, Inc.* v. *United States*, Nos. 92-5022 & 93-0990, 1994 WL 327334 (N.D. Cal. June 13, 1994); *Exxon Co., Int'l* v. *United States*, No. 91-5697 (D.N. J. Dec. 14, 1994); *ITO Corp.* v. *United States*, 1990 WL 129200, 1990 A.M.C. 1439 (S.D. Tex. 1990).

The one contrary ruling is *Hiller Systems, Inc.* v. *AK Engineering, Inc.*, No. 92-12429K (D. Mass. Sept. 27, 1993). The district court there held that the MCILA did not prohibit the bringing of an *in personam* action against the United States based on *in rem* principles of liability arising out of maritime liens under Section 31342. The *Hiller* court relied on the same two erroneous legal determinations that underlie *Bonanni*. The *Hiller* court acknowledged that Congress may have *intended* to prohibit *in personam* actions based on a maritime lien action when it enacted Section 31342, but the court declined to adhere to that intent because it believed Congress "was mistaken in the assumed premise of its legislation action." Slip op. 10. The government did not seek further review in *Hiller* because the complaint was dismissed on other grounds.

3. The issue in this case is one of importance to the United States because the maritime lien liability under the court of appeals' reasoning will extend to contracts for the provision of supplies, services, and repairs for more than 1,000 public vessels. Those supplies and services cost millions of dollars annually to procure. See App., *infra*, 11a n.7; Gov't C.A. Supp. Ltr. Br. 1-5. Public vessels affected include vessels operated by the Coast Guard, the Navy, the Military Sealift Command, the National Oceanic and Atmospheric Association, and the Maritime Administration, which maintains the National Defense

Reserve Fleet. *Id.* at 2. The court of appeals correctly noted that existing statutory and regulatory requirements make it difficult for the government to protect itself in many circumstances against the possibility of double liability created by the ruling below. Such double liability would arise when the government pays its contractor in full, but where the contractor does not, in turn, pay a subcontractor. Under the court of appeals' decision, the subcontractor would have a lien enforceable against the United States despite the absence of any contractual or tort liability. In some circumstances, moreover, the government is prevented by statute from requiring a government contractor to post a bond to ensure that the contractor pays any subcontractors it engages. See App., *infra*, 11a n.7; 33 U.S.C. 891d(c) (Supp. V 1993); 50 U.S.C. App. 1744(c) (Supp. V 1993).

Because of the substantial maritime activity in the area encompassed by the Eleventh Circuit, cases are likely to arise more frequently there than in most other circuits. Neither of the courts below expressed agreement with the Eleventh Circuit precedent they deemed themselves bound to apply. The Eleventh Circuit itself expressed dissatisfaction with its interpretation of the MCILA at the time of its initial ruling in *Bonanni*. The circuit's failure to rehear this case and the *Bonanni* case *en banc*, despite suggestions to do so in both panel opinions and requests by the United States in both cases, indicates that action by this Court is the only remaining judicial avenue available to obtain relief from the erroneous circuit precedent. In view of the clarity of the governing statutory language, the Court may wish to consider summary reversal.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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SEPTEMBER 1995

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 93-9006

TURECAMO OF SAVANNAH, INC.,
PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Southern District of Georgia

[FILED Nov. 1, 1994]

Before: BIRCH and CARNES, Circuit Judges, and BLACKBURN*, District Judge.

BLACKBURN, District Judge:

Plaintiff-appellee Turecamo of Savannah, Inc. ("Turecamo") filed suit pursuant to the Suits in Admiralty Act ("SAA"), 46 U.S.C.App. §§ 741-752

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* Honorable Sharon Lovelace Blackburn, U.S. District Judge for the Northern District of Alabama, sitting by designation.

(1988),[1] to recover money allegedly owed Turecamo by the defendant-appellant United States for towing services for a United States naval vessel. The district court granted Turecamo's motion for summary judgment and entered judgment in favor of Turecamo and against the United States. The United States appeals this ruling, asserting that the Maritime Commercial Instruments and Lien Act ("MCILA"), 46 U.S.C. §§ 31301-31343 (1988), prohibits a cause of action against the United States to enforce a maritime lien against a public vessel. Because we are bound to follow the precedent set in *Bonanni Ship Supply v. United States*, 959 F.2d 1558 (11th Cir.1992),[2] we affirm the district court's decision. However, as discussed *infra*, reconsideration of the holding in *Bonanni*, might be appropriate for en banc review by this court.

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[1] 46 U.S.C.App. § 742 provides:

> In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States. . . . Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found.

[2] *See United States v. Thomas*, 916 F.2d 647, 652 n. 6 (11th Cir.1990); *Garay v. Carnival Cruise Line*, 904 F.2d 1527, 1534 n. 10 (11th Cir.1990), *cert. denied*, 498 U.S. 1119, 111 S.Ct. 1072, 112 L.Ed.2d 1178 (1991).

I. BACKGROUND

The facts of this case are not disputed. Turecamo, a Georgia corporation doing business in Savannah, Georgia, is engaged in the business of towing oceangoing and other vessels. The *YFNB-33 Seacon* is a public vessel owned by the United States. In the fall of 1990, the Government sought to have the *YFNB-33 Seacon* towed from Mayport, Florida, to the United States naval facility in Portsmouth, Virginia. In order to have the vessel towed, the Government, through the offices of the Department of Defense, Military Traffic Management Command, entered into a contract of carriage with Panocean Marine, Inc. ("PMI"). PMI's subsidiary, Project Logistics & Transportation, Inc. ("Project Logistics") contracted with Turecamo for the services of Turecamo's tug, the *Cynthia Turecamo.* Government personnel approved the use of the *Cynthia Turecamo* for the tow, and Turecamo towed the *YFNB-33 Seacon* from Mayport, Florida, to Portsmouth, Virginia, in accordance with the terms of United States Government Bill of Lading D-1383500. Pursuant to its contract with Project Logistics, Turecamo was to receive $55,800 for its towing services; however, Turecamo was paid only $20,800.

Turecamo then filed a Complaint against the United States, as owner of the *YFNB-33 Seacon*, to recover the balance due of $35,000,[3] alleging that the

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[3] In its Complaint, Turecamo asserted that it was still owed $35,800. The court assumes that this was a typographical error because the Affidavit of Edward G. Cawthon, Vice President and General Manager of Turecamo, states that Turecamo is owed $35,000. In addition, this comports with the other figures

district court had jurisdiction pursuant to 28 U.S.C. § 1333 and 28 U.S.C. § 1331. Turecamo asserted that by providing the towing services for the Government's vessel, it had provided necessaries to the vessel within the meaning of 46 U.S.C. § 31342, and therefore had an in personam action pursuant to 46 U.S.C.App. § 742.[4]

Turecamo moved for summary judgment on the ground that Eleventh Circuit precedent[5] holds that a ship repair subcontractor has a maritime lien for necessaries provided to public vessels where the subcontractor contracted with a general contractor which has contracted with the United States for performance of those subject services. Turecamo further asserts that if the subcontractor is not paid by the general contractor, the subcontractor has a right to proceed in personam against the United States by relying on in rem principles to establish liability for unpaid debts owed by the contractor to the subcontractor.

The United States District Court for the Southern District of Georgia granted Turecamo's motion. *See Turecamo of Savannah, Inc. v. United States*, 824

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in the complaint—that the invoice for services was for $55,800, and that Turecamo was paid $20,800.

[4] Turecamo asserted that, pursuant to 46 U.S.C.App. § 743, its action proceeds in accordance with principles of action in rem against the vessel for whom the necessaries have been provided.

[5] The Eleventh Circuit precedent cited by Turecamo included *Bonanni Ship Supply v. United States*, 959 F.2d 1558 (1992); *Marine Coatings v. United States*, 932 F.2d 1370 (1991); and *Stevens Technical Servs. v. United States*, 913 F.2d 1521 (1990).

F.Supp. 1069 (S.D.Ga.1993). The court agreed that Turecamo had met its burden of demonstrating the existence of a maritime lien under the MCILA and held that Turecamo was therefore entitled to recover in personam, utilizing principles of in rem liability. The court entered judgment in favor of Turecamo on June 18, 1993. The Government filed a Notice of Appeal on August 9, 1993.

II. ANALYSIS

The issue before this court is whether the MCILA supports an in personam action against the United States based on in rem principles. We review de novo a district court's grant of summary judgment. *Batey v. Stone*, 24 F.3d 1330, 1333 (11th Cir.1994). In reviewing a grant of summary judgment, we apply the same legal standard that bound the district court. *Tittle v. Jefferson County Comm'n*, 10 F.3d 1535 (11th Cir.1994).

The Government contends that the MCILA precludes a cause of action against the United States based on a maritime lien theory. It provides:

> (a) Except as provided in subsection (b) of this section, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner—
>
> (1) has a maritime lien on the vessel;
>
> (2) may bring a civil action in rem to enforce the lien; and
>
> (3) is not required to allege or prove in the action that credit was given to the vessel.
>
> (b) This section does not apply to a public vessel.

46 U.S.C. § 31342 (emphasis added). Therefore, the Government contends that the existence of a maritime lien against a public vessel under the MCILA is expressly prohibited. In *Bonanni*, although the court noted that "the MCILA on its face appears to preclude the imposition of a maritime lien on a public vessel," the court held that the MCILA does not "preclude the imposition of maritime liens on public vessels where an admiralty plaintiff sues the United States in personam on principles of in rem liability." 959 F.2d at 1562, 1564. The Government acknowledges that *Bonanni* controls, but argues that the panel was incorrect and should be overruled by the court en banc.

A. *Bonanni*'s Interpretation of the MCILA

To determine whether the MCILA precludes imposing a maritime lien on a public vessel, this court in *Bonanni* determined first, that Congress did not intend to effect a change in the substantive law regarding maritime liens when it enacted the MCILA, and, second, that prior to the enactment of the MCILA, this circuit permitted imposing a maritime lien on a public vessel under existing maritime law.

In holding that Congress did not intend to change substantive admiralty law, the *Bonanni* panel relied on the legislative history of 46 U.S.C. § 31342, which provided in part that section 31342 made no substantive change to the law. 959 F.2d at 1562. The *Bonanni* panel therefore concluded that this court's interpretations of substantive admiralty law prior to the enactment of the MCILA bind courts of this circuit interpreting the MCILA. *Id.* at 1563-64.

In examining whether this circuit permitted imposing maritime liens on a public vessel prior to the enactment of the MCILA, the *Bonanni* panel noted that this court, in *Marine Coatings v. United States*, 932 F.2d 1370 (11th Cir.1991), and *Stevens Technical Services v. United States*, 913 F.2d 1521 (11th Cir.1990), "rejected the very rule that Congress had perceived to be in force when it enacted the MCILA, and . . . acknowledged the availability of in personam actions against the United States on in rem principles of liability." 959 F.2d at 1563. The court further stated:

> Although Congress may have thought when it enacted the MCILA that existing federal law precluded imposition of a maritime lien on a public vessel, this circuit's interpretations of that law, in particular the "no lien" clause of the PVA, state otherwise. A reading of the MCILA that does not preclude the imposition of a maritime lien against a public vessel, and only prohibits the arrest and seizure of the vessel as a means of effecting recovery against the Government, is both plausible and fully consistent with *Stevens* and *Marine Coatings*.

Id. (footnote omitted). Therefore, the court concluded that the MCILA does not preclude the imposition of maritime liens on public vessels where an admiralty plaintiff sues the United States in personam on principles of in rem liability. *Id.* at 1564.

B. Legislative History of the MCILA

In 1988, Congress enacted the MCILA. 46 U.S.C. § 31342 originally provided:

> (a) A person providing necessaries to a vessel (**except a public vessel**) on the order of a person listed in section 31341 of this title or a person authorized by the owner—
>
> (1) has a maritime lien on the vessel;
>
> (2) may bring a civil action in rem to enforce the lien; and
>
> (3) is not required to allege or prove in the action that credit was given to the vessel.

Pub.L. No. 100-710, 102 Stat. 4748 (1988) (emphasis added). The legislative history of this section states that "[t]his section makes no substantive change to law. This section does not supersede the prohibition under the Public Vessels Act, the Foreign Sovereign Immunities Act, or the Suits in Admiralty Act, on bringing an in rem action against a public vessel." H.R.Rep. No. 918, 100th Cong., 2d Sess. 7, *reprinted in* 1988 U.S.C.C.A.N. 6104, 6141. However, this statement was written at a time when the provision did not expressly exclude public vessels. *See* H.R.Rep. No. 918, 100th Cong., 2d Sess. 7, at 8 (1988).[6]

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[6] The public vessels exclusion was added later at the suggestion of the Justice Department. *See* H.R.Rep. No. 918, 100th Cong., 2d Sess. 7, *reprinted in* 1988 U.S.C.C.A.N. 6104, 6149.

In 1989, Congress deleted the parenthetical phrase excepting public vessels and placed the exception in a separate subsection as follows:

> (a) Except as provided in subsection (b) of this section, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner—
>
> (1) has a maritime lien on the vessel;
>
> (2) may bring a civil action in rem to enforce the lien; and
>
> (3) is not required to allege or prove in the action that credit was given to the vessel.
>
> (b) This section does not apply to a public vessel.

46 U.S.C. § 31342 (emphasis added). Representative Robert W. Davis explained the reason for amending the statute:

> Likewise, we have clarified provisions relating to maritime liens against public vessels. Although I felt that we had taken [care] of any uncertainty last year, we have rewritten section 31342 to clarify once and for all the fact that a claim may not be brought either in personal [sic] or in rem on a maritime lien theory against a public vessel.

135 CONG.REC. 9184 (daily ed. Nov. 20, 1989). The legislative history further provides:

> Section 31342 has been rewritten by deleting the parenthetical provisions relating to excluding public vessels from the application of the existing law and replacing it with a new subsection (b) to assure clarity. **This is not a substantive**

> **change but simply makes more explicit the long established rule of law prohibiting maritime liens against public vessels. It further clarifies the existing law that a claim may not be brought either in personam or in rem on a maritime lien theory against a public vessel.** This section does not affect a cause of action against the United States based on a valid maritime contract.

135 CONG.REC. 9312 (daily ed. Nov. 21, 1989) (emphasis added).

C. Application to Present Action

Because of this court's decision in *Bonanni*, the district court was correct in granting Turecamo's motion for summary judgment. Turecamo has satisfied the requirements of the MCILA, 46 U.S.C. § 31341; that is, Turecamo has demonstrated that PMI and its subsidiary, Project Logistics were authorized to act for the vessel owner by showing the following: (1) Performance of towing services is a necessary within the meaning of the MCILA, 46 U.S.C. §§ 31341 and 31342; (2) Government personnel approved the use of the tug, *Cynthia Turecamo*; and (3) the Government accepted the vessel upon delivery. Therefore, based upon existing Eleventh Circuit precedent, the district court correctly concluded that Turecamo had sustained its burden of demonstrating the existence of a maritime lien under the MCILA, and that Turecamo was thus entitled to recover in personam utilizing principles of in rem liability.

However, the rule announced in *Bonanni* may be appropriate for en banc reconsideration[7] for the following reasons:

1. As explained *supra*, the portion of section 31342's legislative history stating that the maritime lien provision "makes no substantive change in the law" was written at a time that the provision did not expressly exclude public vessels. *See* H.R.Rep. No. 918, 100th Cong., 2d Sess. 7, at 8 (1988).[8] It does not

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[7] At the court's request, oral argument focused on whether this issue was of such importance to merit en banc review. The Government emphasized that Congress thought the issue was important enough to amend the Act to clarify the law. The court requested that the parties submit letter briefs on whether this issue was worthy of utilizing the en banc resources of the Eleventh Circuit. The Government has responded that "the potential for maritime lien liability extends to over 1,000 public vessels, and therefore involves a substantial amount of money." As an example, the Government cited unpublished statistics which include that the United States Coast Guard entered into 214 contracts for necessaries in fiscal year 1993, for estimated expenditures of over $51 million. The Government further informed the court that there are currently eight pending cases involving this issue with over one million dollars at stake. In fact, the Government pointed out that the present case is the fourth case in the past five years in which this issue has been before the Eleventh Circuit. The Government also asserts that existing statutory and regulatory requirements make it extremely difficult for the Government to protect itself from the prospect of paying twice for necessary services and repairs to public vessels. For example, in many cases the Government is precluded by statute from requiring the prime contractor to post a bond to ensure that subcontractors will be paid. *See, e.g.*, 33 U.S.C.A. § 891d(c) (West Supp.1994); 50 U.S.C.A.App. § 1744(c) (West 1990).

[8] As noted *supra* at footnote 6, the public vessels exclusion was added later at the suggestion of the Justice Department.

appear that this was pointed out to the panel deciding *Bonanni*. Perhaps the panel would have reached a different result had the Government in that case educated the court on the timing of that statement in the enactment of the statute.

2. Although generally the MCILA was aimed at codifying existing maritime law, Congress stated that the Act also made a great many substantive changes. *See* H.R.Rep. No. 918, 100th Cong., 2d Sess. 7, *reprinted in* 1988 U.S.C.C.A.N. 6104, 6108-09 ("The Committee wants to make it clear, however, that the bill as reported does in fact make a great many substantive changes to the present law. . . . The Committee intends and hopes that the interpretation of the laws as codified and enacted by this bill will be based on the language off [sic] the bill itself. . . . There is no mandate in logic or case laws for reliance on legislative history to reach a result contrary to the plain meaning of the statute, particularly where that plain meaning is in no way unreasonable.")

3. The legislative history behind the 1989 amendment emphasizes Congress' intent that "a claim may not be brought either in personam or in rem on a maritime lien theory against a public vessel." *See* 135 CONG.REC. 9312 (daily ed. Nov. 21, 1989).

4. Because Congress has expressly stated its intent,[9] it is inappropriate to second-guess Congress'

See H.R.Rep. No. 918, 100th Cong., 2d Sess. 7, *reprinted in* 1988 U.S.C.C.A.N. 6104, 6149.

[9] The *Bonanni* panel acknowledged that Congress intended to codify a rule prohibiting both in personam and in rem actions asserting maritime liens against public vessels. *See Bonanni*, 959 F.2d at 1563 ("In enacting section 102 of the

view of existing law. *See Brown v. General Servs. Admin.*, 425 U.S. 820, 828, 96 S.Ct. 1961, 1966, 48 L.Ed.2d 402 (1976) ("Whether that understanding of Congress was in some ultimate sense incorrect is not what is important. . . . For the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was."). Also, assuming Congress did incorrectly interpret the state of the existing law, such interpretation was not unreasonable. As the *Bonanni* panel acknowledged, *Stevens Technical* and *Marine Coatings* were both decided after the 1988 Act and the 1989 amendment. At the time Congress enacted the MCILA, *Canadian Aviator v. United States*, 324 U.S. 215, 65 S.Ct. 639, 89 L.Ed. 901 (1945) (which involved a tort claim for negligence), was the only decision casting doubt on the perception of Congress. In addition, one year before Congress enacted the MCILA, a district court had stated that "46 U.S.C. § 788 [of the Public Vessels Act] forbids liens against public vessels." *River & Offshore Servs. Co. v. United States*, 651 F.Supp. 276, 281 (E.D.La.1987). Therefore, one can see how Congress could have misinterpreted the existing law.

5. Even if Congress misinterpreted the existing law, Congress has now made it clear that a claim may

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MCILA, Congress was in essence reasserting what it perceived to be a longstanding rule against the imposition of maritime liens against public vessels. . . . This court in *Stevens* and *Marine Coatings*, however, has rejected the very rule that Congress had perceived to be in force when it enacted the MCILA, and has acknowledged the availability of in personam actions against the United States on in rem principles of liability.").

not be brought on a maritime lien theory against a public vessel. *See* 135 CONG.REC. 9312 (daily ed. Nov. 21, 1989); *see also* 135 CONG.REC. 9183 (daily ed. Nov. 20, 1989); 135 CONG.REC. 9184 (daily ed. Nov. 20, 1989).

III. CONCLUSION

Following *Bonanni*, the district court properly granted Turecamo's Motion for Summary Judgment. Therefore, we AFFIRM.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CIV. A. NO. CV492-250

TURECAMO OF SAVANNAH, INC.

v.

UNITED STATES OF AMERICA

[FILED: JUNE 18, 1993]

ORDER

ALAIMO, Senior District Judge.

On September 24, 1992, Plaintiff, Turecamo of Savannah, Inc. ("Turecamo"), filed this admiralty and maritime claim, pursuant to the Suits in Admiralty Act ("the SAA"), 46 U.S.C. app. §§ 741-52 (1988), and the Maritime Commercial Instruments and Liens Act ("the MCILA"), 46 U.S.C. §§ 31301-31343 (1988). Turecamo alleges the existence of a maritime lien against a United States Navy vessel as the result of towing services that Turecamo performed. This action is presently before the Court on a motion by Turecamo for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure. Specifically, Turecamo contends that there are no genuine issues of material fact in dispute and, thus, summary

judgment is appropriate as a matter of law. For the reasons discussed below, summary judgment will be GRANTED in favor of Turecamo.

FACTS

Turecamo, a Georgia corporation doing business in Savannah, Georgia, is engaged in the business of towing oceangoing vessels. (Compl. at 1). Defendant, through the United States Navy, is the owner of the vessel YFNB-33 SEACON, which in November of 1990 was moored in Mayport, Florida. On November 21, 1990, Defendant, through the offices of the Department of Defense, Military Traffic Management Command, entered into a contract with Panocean Marine, Inc. ("PMI"), a Louisiana corporation, to have the YFNB-33 SEACON towed from Mayport, Florida, to the United States naval facility in Portsmouth, Virginia. *Id.* at 2.

To carry out its obligation, PMI, through its parent corporation, Project Logistics and Transportation, Inc. ("Project Logistics"), entered into a contract with Turecamo for the services of Turecamo's tug, the CYNTHIA TURECAMO. *Id.* Turecamo contends, and the Government does not challenge, that the nomination of the CYNTHIA TURECAMO to perform the tow was with the express knowledge and approval of Defendant. *Id.* Accordingly, pursuant to the terms of the United States Government bill of lading number D-1383500, which expressly designates the CYNTHIA TURECAMO as the towing vessel, Turecamo properly towed the vessel to the designated facility in Portsmouth, Virginia, in early December of 1990. *Id.* Turecamo sent Project Logistics an invoice for $55,800 for the towage; however, Turecamo was paid only $20,800 for its services. As such,

Turecamo initiated this present case to recover the balance.

In the instant action, Turecamo acknowledges that the existence of a maritime lien against a public vessel under the MCILA is expressly prohibited. 46 U.S.C. § 31342(b) (1988). Nevertheless, Turecamo argues that the language of the MCILA notwithstanding, the Eleventh Circuit has recognized that the MCILA "does not preclude the imposition of maritime liens on public vessels where an admiralty plaintiff sues the United States *in personam* on principles of *in rem* liability." *Bonanni Ship Supply, Inc. v. United States*, 959 F.2d 1558, 1564 (11th Cir.1992). *See also Marine Coatings of Alabama, Inc. v. United States*, 932 F.2d 1370 (11th Cir.1991); *Stevens Technical Servs., Inc. v. United States*, 913 F.2d 1521 (11th Cir.1990). Relying upon this line of cases, Turecamo brings the present *in personam* action, in accordance with principles of actions *in rem*, against the YFNB-33 SEACON, the vessel for which the services have been provided. (Compl. at 3).

In its motion for summary judgment, Turecamo contends that there are no genuine issues of material fact in dispute. Turecamo claims that it provided "necessaries" for the YFNB-33 SEACON by towing the vessel to Portsmouth, Virginia. *See* 46 U.S.C. § 31342 (1988). In addition, Turecamo asserts that Defendant's personnel approved of the use of the CYNTHIA TURECAMO, which is a necessary requirement in order for a subcontractor to pursue an action against the owner. *See* 46 U.S.C. §§ 31341 and 31342 (1988); *see also Stevens Technical*, 913 F.2d at 1534-35. Accordingly, Turecamo claims that it has met all of the requirements to pursue an *in personam*

action using principles of *in rem* liability and, thus, summary judgment in its favor is appropriate. In response, Defendant does not contest the facts presented by Turecamo. (Def.'s Opposition to Pl.'s Mot. for Summ.J. at 1). Instead, Defendant merely argues that the MCILA is clear that a maritime lien may not be pursued against a public vessel. As such, Defendant contends that the Eleventh Circuit cases are wrongly decided and should not be followed.

DISCUSSION

I. *Standard for Summary Judgment*

Summary judgment requires the movant to establish the absence of genuine issues of material fact, such that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153, 90 S.Ct. 1598, 1605, 26 L.Ed.2d 142 (1970). Summary judgment is also proper "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The non-moving party to a summary judgment motion need make this showing only after the moving party has satisfied its burden. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir.1991). The court should consider the pleadings, depositions and affidavits in the case before reaching its decision, Fed.R.Civ.P. 56(c), and all reasonable inferences will be made in favor of the non-movant. *Adickes*, 398 U.S. at 158-59, 90 S.Ct. at 1609.

II. *Maritime Lien*

A. Statutory Framework

1. Waiver of Sovereign Immunity

As a waiver of the United States' sovereign immunity, Congress, in 1920, passed the SAA "which provided generally that a 'libel in personam' for damages could be filed against the government in any case where, if the government merchant vessel were privately owned or operated, a 'proceeding in admiralty' could be maintained."[1] *Canadian Aviator Ltd. v. United States*, 324 U.S. 215, 220, 65 S.Ct. 639, 642, 89 L.Ed. 901 (1945). *See* 46 U.S.C. app. § 742 (1988). The SAA explicitly states, however, that no vessel owned by the United States "shall . . . be subject to arrest or seizure by judicial process in the United States or its possessions." 46 U.S.C. app. § 741 (1988).

Subsequently, in 1925, Congress expanded the waiver of sovereign immunity in the SAA, which at that time was limited to "merchant" vessels, to include all "public" vessels. This expansion occurred via passage of the Public Vessels Act ("the PVA") (now codified at 46 U.S.C. app. §§ 781-90 (1988)). The PVA provides:

---

[1] In 1960, the SAA was amended to delete the clause requiring that the vessel be employed as a "merchant vessel." This amendment was enacted to eliminate the controversy over when a vessel constituted a "merchant vessel." *Stevens Technical Servs., Inc. v. United States*, 913 F.2d 1521, 1528 (11th Cir.1990). As a result, the SAA now "covers all vessels owned or operated by the government, whether acting in the capacity of a typical freight-earning ship or in the capacity of a public vessel under control of military authorities." *Id.*

> A libel action in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States. . . .

46 U.S.C. app. § 781 (1988). Similar to the SAA, however, the PVA contains a provision stating that "[n]othing in this chapter shall be construed to recognize the existence of or as creating a lien against any public vessel of the United States." 46 U.S.C. app. § 788 (1988).

2. Statutory Creation of Maritime Lien

In 1910, Congress passed the now-repealed Federal Maritime Lien Act ("FMLA"), which in part provided:

> [a]ny person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

Act of June 23, 1910, c. 373 § 1, 36 Stat. 604 (repealed 1988). The act "significantly broaden[ed] the number and variety of maritime liens that [could] arise by contract[, providing] a statutory right to a lien for the named items of repairs, supplies, towage, and drydocking, as well as any other 'necessaries' of all

kinds." Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 8-3, at 256 (1987).

In 1988, the FMLA was repealed by Congress and recodified as the MCILA, which became effective January 1, 1989. The MCILA, as amended, provides in part:

> (a) Except as provided in subsection (b) of this section, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner—
>
> (1) has a maritime lien on the vessel;
>
> (2) may bring a civil action in rem to enforce the lien; and
>
> (3) is not required to allege or prove in the action that credit was given to the vessel.
>
> (b) This section does not apply to a public vessel.

46 U.S.C. § 31342 (1988). Accordingly, except for the addition of subsection (b), which explicitly states that the section does not apply to public vessels, the MCILA essentially contains the same provisions for creating a maritime lien as the former FMLA.

B. Eleventh Circuit Precedent

In *Stevens Technical Servs., Inc., v. United States*, 913 F.2d 1521 (11th Cir.1990), the Eleventh Circuit first addressed the issue of whether or not a subcontractor, which performed repairs on a public vessel, could pursue an action under a maritime lien theory against the United States for payment on the repairs. In *Stevens Technical*, the plaintiff subcon-

tractor contracted with the prime contractor to perform repairs on a public vessel of the United States. *Id.* at 1525. The prime contractor's contract was accepted and approved by government agencies and included notice that the plaintiff subcontractor would perform significant work. *Id.* After the completion of the work, the prime contractor failed to reimburse the subcontractor for the full balance. *Id.* at 1526. As a result, the subcontractor filed an *in personam* action against the prime contractor and an *in rem* action against the United States, as the owner of the vessel. *Id.* After a bench trial, judgment was entered against the prime contractor for the amount due; however, the claim against the United States was dismissed upon a finding that an *in rem* action could not be pursued against the United States. *Id.*

Upon appeal, the Eleventh Circuit thoroughly discussed the history of the SAA and the PVA. The court concluded that the prohibition against "arrest or seizure" of a public vessel in the SAA was substantially the same as the prohibition against the creation of "a lien against any public vessel" under the PVA. *Id.* at 1524; *see also* 46 U.S.C. app. §§ 741 and 788 (1988). The court found that the only limitation these provisions were intended to provide were against the seizure or arrest of a government vessel.[2] *Stevens Technical*, 913 F.2d at 1524. Otherwise, the

---

[2] The court stated that these provisions:

> are in no sense a prohibition on the creation or existence of a maritime lien. They each assure that there can be no arrest or seizure of a government vessel.

Stevens Technical, 913 F.2d at 1524.

statutes " 'impose on the United States the same liability (*apart from seizure or arrest under a libel in rem*) as is imposed by the admiralty law on the private ship owner. . . .'" *Id.* (quoting *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 228, 65 S.Ct. 639, 646, 89 L.Ed. 901 (1945)). Accordingly, the court found that the plaintiff could pursue an "*in personam* [action] against the government to be determined on principles of both *in personam* and *in rem* liability under the maritime law." *Id.*

Having found that the plaintiff could pursue an *in personam* action against the government, using *in rem* principles of liability, the court addressed whether the plaintiff, in fact, had a maritime lien against the government under the FMLA. *Id.* at 1534-37. The court found that the repairs performed by the plaintiff subcontractor constituted "necessaries" under the FMLA. In addition, the court concluded that "the repairs performed by [the plaintiff subcontractor] were ordered by authorized persons, performed by [the plaintiff], and accepted by authorized persons so that [the plaintiff] became a lienor under §§ 971-73" of the FMLA, and there was no waiver of the lien. *Id.* at 1537.

Under a similar set of facts, the Eleventh Circuit returned to this issue in *Marine Coatings of Alabama, Inc. v. United States*, 932 F.2d 1370 (11th Cir.1991). The court summarized the case by stating that:

> [t]he gist of the complaint was that although [the plaintiff subcontractor] was filing an *in personam* action to recover damages [for nonpayment on ship repairs performed], it was relying on the [FMLA] (which contains an *in rem* provision

> similar to a common law mechanic's lien) to attach a lien to the three ships in order to secure payment of the amounts owed.

Id. at 1373. The court rejected the government's challenge to such a proceeding and, relying upon *Stevens Technical*, stated that "[t]he law of our circuit is that the SAA and PVA permit the use of the libel *in personam* on principles of *in rem* liability notwithstanding the no lien clause located at 46 U.S.C.App. § 788." *Id.* at 1375. As such, the case was reversed and remanded for further proceedings by the district court. *Id.* at 1377.

After the repeal of the FMLA in 1988 and the recodification under the MCILA, it was unclear whether the *Stevens Technical-Marine Coatings* rationale still applied in the Eleventh Circuit. The uncertainty was heightened due to the explicit inclusion in the MCILA that 46 U.S.C. § 31342 "does not apply to [ ] public vessel[s]." *See* 46 U.S.C. § 31342(b) (1988). The Eleventh Circuit addressed this issue in *Bonanni Ship Supply, Inc. v. United States*, 959 F.2d 1558 (11th Cir.1992). The court noted that:

> [t]he legislative history of section 31342 of the MCILA states that '(t)his section makes *no substantive change to law.* This section does not supersede the prohibition under [the PVA], the Foreign Sovereign Immunities Act, or [the SAA], on bringing an *in rem* action against a public vessel.'

Id. at 1562 (quoting H.Rep. No. 100-918, *reprinted at* 7 U.S.C.C.A.N., 100th Cong., 2d Sess. 6104, 6141 (1988) (emphasis added)). Accordingly, the court found that:

> because Congress did not purport to alter the rights and obligations of parties under preexisting admiralty law when it enacted the MCILA, and because we are bound to apply this court's interpretations of the preexisting law in *Stevens [Technical]* and *Marine Coatings* unless otherwise directed by the United States Supreme Court or the Eleventh Circuit en banc, we hold here that the district court erred in interpreting the MCILA to preclude the imposition of maritime liens on public vessels where an admiralty plaintiff sues the United States *in personam* on principles of *in rem* liability.

Id. at 1563-64.

C. Application to Present Action

In the present action, there is no dispute as to the material facts. Turecamo towed Defendant's vessel to Portsmouth, Virginia, and, therefore, as required by the MCILA, Turecamo provided "necessaries" to the YFNB-33 SEACON. 46 U.S.C. § 31342 (1988). In addition, Defendant's personnel were aware of the subcontract between Turecamo and Project Logistics. Defendant's personnel approved of the use of the tug, the CYNTHIA TURECAMO, as evidenced by the bill of lading. Finally, Defendant's personnel accepted the delivery of the YFNB-33 SEACON from Turecamo. These factors support the requirement, under 46 U.S.C. § 31342, that the necessaries be provided on order of the owner or a person authorized by the owner. *See Stevens Technical*, 913 F.2d at 1534-36; *see also* 46 U.S.C. § 31341 (1988) (listing those persons presumed to have authority to procure necessaries as including the owner, master or

"person[s] entrusted with the management of the vessel at the port of supply"). Based upon these facts, this Court finds that Turecamo has met its burden of demonstrating the existence of a maritime lien under the MCILA and, thus, Turecamo is entitled to recover *in personam*, utilizing principles of *in rem* liability.

Notwithstanding its failure to contest Turecamo's statement of material facts, Defendant contends that Turecamo is not entitled to summary judgment because Congress' intent in enacting the MCILA was clearly not to allow the establishment of a lien against a public vessel. Defendant argues that the enactment of the MCILA was a change in the law from the FMLA, and the Eleventh Circuit's *Bonanni* ruling was incorrect. As support, Defendant cites the following legislative history, related to the addition of subsection (b) to 46 U.S.C. § 31342, which states:

> [s]ection 31342 has been rewritten by deleting the parenthetical provisions relating to excluding public vessels from the application of the existing law and replacing it with a new subsection (b) to assure clarity. This is not a substantive change but simply makes more explicit the long established rule of law prohibiting maritime liens against public vessels. It further clarifies the existing law that a claim may not be brought either in personam or in rem on a maritime lien theory against a public vessel. This section does not affect a cause of action against the United States based on a valid maritime contract.

101st Cong., 1st Sess., 135 Cong.Rec. 9308, 9312 (1989) (House Committee on Merchant Marine and Fisheries' section-by-section analysis of H.R. 2459, Coast Guard Authorization Act of 1989).

While Defendant has presented persuasive evidence that, arguably, Congress' intent was to ensure that a lien against a public vessel be foreclosed, this Court is not free, as Defendant suggests, to ignore the clear ruling of the Eleventh Circuit. If the law of this jurisdiction is incorrect, it is for the United States Supreme Court or the Eleventh Circuit, *en banc*, to so state. *Bonanni*, 959 F.2d at 1564. This Court, therefore, is bound by the interpretation of the Eleventh Circuit regarding the MCILA. *Id.* at 1563. Accordingly, Turecamo's motion for summary judgment will be granted.

CONCLUSION

For the foregoing reasons, summary judgment is hereby GRANTED in favor of Turecamo. The Clerk of Court is directed to enter an appropriate judgment in favor of Plaintiff, Turecamo.

SO ORDERED.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NO. 93-9006

TURECAMO OF SAVANNAH, INC.,
PLAINTIFF-APPELLEE

versus

UNITED STATES OF AMERICA,
DEFENDANT-APPELLANT

On Appeal from the United States District Court
for the Southern District of Georgia

[FILED June 30, 1995]

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: BIRCH and CARNES, Circuit Judges, and BLACKBURN*, District Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the

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* Honorable Sharon Lovelace Blackburn, U.S. District Judge for the Northern District of Alabama, sitting by designation.

Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll of the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Stanley F. Birch, Jr.
UNITED STATES CIRCUIT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 93-9006

TURECAMO OF SAVANNAH, INC.,
PLAINTIFF-APPELLEE

versus

UNITED STATES OF AMERICA,
DEFENDANT-APPELLANT

[FILED March 10, 1994]

ON SUGGESTION OF HEARING EN BANC

Before: TJOFLAT, Chief Judge, DUBINA and BLACK, Circuit Judges.

No Judge in regular service on the Court having requested that the Court be polled on hearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Hearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE

APPENDIX E

The Maritime and Commercial Instruments and Liens Act, 46 U.S.C. 31341-31342 (1988 & Supp. V 1993), provides in relevant part:

§ 31341. Persons presumed to have authority to procure necessaries

(a) The following persons are presumed to have authority to procure necessaries for a vessel:

(1) the owner;
(2) the master;
(3) a person entrusted with the management of the vessel at the port of supply; or
(4) an officer or agent appointed by—
(A) the owner;
(B) a charterer;
(C) an owner pro hac vice; or
(D) an agreed buyer in possession of the vessel.

(b) A person tortiously or unlawfully in possession or charge of a vessel has no authority to procure necessaries for the vessel.

§ 31342. Establishing maritime liens

(a) Except as provided in subsection (b) of this section, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner—

(1) has a maritime lien on the vessel;
(2) may bring a civil action in rem to enforce the lien; and

(3) is not required to allege or prove in the action that credit was given to the vessel.

(b) This section does not apply to a public vessel.

The Suits in Admiralty Act of 1920, 46 U.S.C. App. 741-752, provides in relevant part:

§ 741. Exemption of United States vessels and cargoes from arrest or seizure

No vessel owned by the United States * * * shall * * *, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States * * *.

§ 742. Libel in personam

In cases where if such vessel were privately owned or operated, * * * a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States * * *.

§ 743. Procedure in cases of libel in personam

Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. * * * If the libelant so elects in his libel, the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any

proper case from seeking relief in personam in the same suit. * * *.

The Public Vessels Act of 1925, 46 U.S.C. App. 781-790, provides in relevant part:

§ 781. Libel in admiralty against or impleader of United States

A libel in personam in admiralty may be brought against the United States * * * for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States * * *.

§ 788. Lien not created against public vessels

Nothing contained in this chapter shall be construed to recognize the existence of or as creating a lien against any public vessel of the United States.

Supreme Court, U.S.
FILED
NOV 2 1995
CLERK

No. 95-525

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

vs.

TURECAMO OF SAVANNAH, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Whether, given the fact that Congress in enacting the *Maritime Commercial Instruments and Liens Act* (MCILA), 46 U.S.C. § 31301, *et seq.* did not intend to change the substantive law governing a party's right to bring an *in personam* action based on *in rem* principles against the United States and, given the fact that there is only one Circuit Court opinion on the limited issue raised by Petitioner, this Court should not grant the Petition for Writ of Certiorari.

LIST OF PARTIES PURSUANT TO RULE 29.1

The United States was the Appellant in the proceeding below and Respondent Turecamo of Savannah, Inc. was the Appellee.

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No. 95-525

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

vs,

TURECAMO OF SAVANNAH, INC.

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent Turecamo of Savannah, Inc. brought this action against Petitioner, United States of America pursuant to the *Maritime Commercial Instruments and Lien Act,* 46 U.S.C. § 31341. Respondent, a towing company, alleged that it had provided necessaries to the United States vessel, YFNB-33 SEACON. Based on the Eleventh Circuit's decision in *Bonanni Ship Supply, Inc. v. United States,* 959 F.2d 1558 (11th Cir. 1992),

Respondent filed a Motion for Summary Judgment on April 27, 1993. The lower court granted Respondent's Motion for Summary Judgment. Petitioner filed its Notice of Appeal on August 9, 1993.

The facts are not in dispute. On November 21, 1990, Petitioner entered into a contract of ocean carriage with Pan Ocean Marine, Inc. for the towage of Petitioner's vessel, YFNB-33 SEACON from Mayport, Florida to the United States Naval facility in Portsmith, Virginia. Subsequently, Petitioner, Pan Ocean Marine, Inc.'s parent corporation, Project Logistics and Transportation, Inc., contracted with Respondent to perform the tow. Petitioner was aware that Respondent's vessel was to tow its vessel. Thus, there was no dispute that Respondent was authorized to provide the necessaries.

Respondent's tug, CYNTHIA TURECAMO, towed the YFNB-33 SEACON from Mayport, Florida to Portsmith, Virginia. Respondent's invoice for services was $55,800. However, Respondent only received $20,800 from Project Logistics and Transportation, Inc. for its towing services. Thus, Respondent is still owed $35,000.

Pursuant to the terms of the *Suits and Admiralty Act* (SIAA), 46 U.S.C. § 741, *et seq.* and the *Maritime and Commercial Instruments and Liens Act* (MCILA), 46 U.S.C. §§ 31301-31343, on September 23, 1992, Respondent filed an *in personam* action against Petitioner. Alleging that, as authorized, it had provided necessaries to Petitioner's vessel, with authorization, Respondent, thereafter, filed a Motion for Summary Judgment. The basis of Respondent's motion was that, as recognized by this Court in *Bonanni Ship Supply, Inc. v. United States*, 959 F.2d 1558 (1992), Respondent had a right to pursue an *in personam* action against the United States by utilizing *in rem* remedies. On June 18, 1993, the lower court granted Respondent's Motion for

Summary Judgment. The Eleventh Circuit Court of Appeals affirmed the decision of the lower court and denied Petitioner's Request for *En Banc* Consideration.

SUMMARY OF THE ARGUMENT

Following precedent established in *Stevens Technical Services, Inc. v. United States*, 913 F.2d 1521 (11th Cir. 1990), the Eleventh Circuit Court of Appeals held that Respondent Turecamo of Savannah, Inc. had a right to bring an *in personam* action, based on *in rem* principles, for towing services that benefited Petitioner. In enacting the *Maritime Commercial Instruments and Liens Act* (MCILA), 46 U.S.C. § 31301, *et seq.*, Congress did not intend to change substantive law which had existed under the *Maritime Liens Act*, 46 U.S.C. § 971. Thus, like the *Suits in Admiralty Act*, 46 U.S.C. § 741, *et seq.*, the *Public Vessels Act* (PVA), 46 U.S.C. § 788 and the *Foreign Sovereign Immunities Act* (FSIA), 28 U.S.C. § 1330, *et seq.*, a private party has a right to bring an *in personam* action, based on *in rem* principles.

The issue presented by Petitioner is not one of constitutional significance. It is not one of broad national application. Moreover, there is only one Circuit Court which has ruled on this limited issue. For these reasons, the issue raised by Petitioner is not of significance for which this Court should grant a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

GIVEN THE FACT THAT THE UNITED STATES CONGRESS, IN ENACTING THE *MARITIME COMMERCIAL INSTRUMENTS AND LIENS ACT* (MCILA), 46 U.S.C. § 31301, *ET SEQ.* DID NOT CHANGE THE SUBSTANTIVE LAW PERMITTING *IN PERSONAM* ACTIONS, BASED ON *IN REM* PRINCIPLES, AGAINST THE UNITED STATES, THE DECISION OF THE ELEVENTH CIRCUIT WAS CORRECT.

Prior to the enactment of the *Maritime Commercial Instruments and Liens Act,* 46 U.S.C. § 31342, a provider of necessaries to a United States vessel had an unquestioned right to pursue an *in personam* action, based on *in rem* principles, against the United States *Stevens Technical Services, Inc. v. United States,* 913 F.2d 1521 (11th Cir. 1990). In that case, brought under the predecessor of the MCILA, *The Federal Maritime Lien Act (MLA),* 46 U.S.C. § 971, Judge John R. Brown, an acknowledged Admiralty judge and former Admiralty practitioner, analyzed very carefully the development of actions against the United States as owner of public vessels. In finding that a subcontractor had a right, under the MLA, to bring an *in personam* action, based on *in rem* principles, Judge Brown analogized the issue to those actions brought under the *Suits in Admiralty Act,* 46 U.S.C.§ 741, *et seq.* and the *Public Vessels Act,* 46 U.S.C. § 788. Both statutes specifically provide that a party may bring an *in personam* action based on *in rem* principles against the United States.

Section 742 of the SIAA provides as follows:

> **Libel in personam**
>
> In cases where if such vessel were privately

> owned or operated, . . . a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States. . . .

Section 743 of the SIAA provides as follows:

> **Procedure in cases of Libel in personam**
>
> Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. . . . If the libelant so elects in his libel, the suit may proceed in accordance with the principles of libel in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. . . .

Moreover, § 781 of the PVA provides as follows:

> **Libel in admiralty against or impleader of United States**
>
> A libel in personam in admiralty may be brought against the United States . . . . for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States . . . .

Seasoned admiralty practitioners understand that, in a strict sense, a party does not have a maritime lien against a public vessel. A lien is a prerequisite to an *in rem* proceeding under Rule C, *Supplemental Rules for Certain Admiralty and Maritime Claims*. Thus, having no maritime lien, the party cannot arrest a public vessel. 46 U.S.C. § 741 (SIAA); 46 U.S.C. § 788 (PVA). Nonetheless, under both statutes, SIAA and PVA, the aggrieved party may bring an *in personam* action in accordance with *in rem* principles. In other words, if the party would have had the *in rem* right against a privately owned vessel, it has *in personam* remedies against the United States.

In *Stevens, id.*, Judge Brown concluded that the "no lien clause" contained in § 788 of the PVA did not prohibit litigants from bringing a libel *in personam* on principles of *in rem* liability as permitted under §§ 742 and 743 (SIAA, 913 F.2d at 1533). The action in *Stevens* was brought for sums due a subcontractor for repairs to the USS SEALIFT ANTARCTIC, a public vessel demise chartered to the United States through the Military Sealift Command, a subdivision of the United States Navy.

Had Stevens Technical Services, Inc., the subcontractor, provided the necessaries to a privately owned vessel, it would have had *in rem* rights against the vessel. 46 U.S.C. § 971. Thus, Stevens could use *in rem* principles in pursuing the *in personam* claim against the United States. Of significance, there is no contrary circuit court opinion on this issue.

Following the direction from *Stevens*, the Eleventh Circuit in *Bonanni Ship Supply, Inc. v. United States.*, 959 F.2d 1558 (11th Cir. 1992), held that a subcontractor could, under the recently enacted MCILA, pursue an *in personam* action in accordance with *in rem* principles. Thus, the Eleventh Circuit construed the MCILA no differently than it had the MLA. Referring to the congressional intent extracted from the Committee Reports

published in the Official Congressional Record, the court noted that § 31342 made no change in the substantive law:

> [t]his Section makes no substantive change to law. This Section does not supersede the prohibition under the Public Vessels Act, the Foreign Sovereign Immunities Act, or the Suits in Admiralty Act, on bringing an *in rem* action against a public vessel.

959 F.2d at 1562. (Quoting from H. Rep. No. 100-918, 7 U.S. Code Cong. and Admin. News 100th Cong. 2nd Sess. 6140, 6141 (1988).)

This statement is consistent with the language of § 31342 of the MCILA. Nowhere in the text of § 31342 is there any suggestion that Congress had altered the longstanding substantive right — to pursue *in personam* actions in accordance with *in rem* principles. Section 31342 simply codified the pre-existing decisional authority which, in accordance with the statutes, had permitted *in personam* actions based on *in rem* principles. Thus, the MCILA is consistent with the SIAA, PVA and the FSIA. These statutes do not permit *in rem* actions but permit *in personam* actions based on *in rem* principles.

When the Eleventh Circuit considered the identical issue in this case, Petitioner United States again asserted that, in enacting the MCILA, Congress had intended to alter the substantive law, *i.e.*, that the MCILA as technically revised in 1989 prohibited an *in personam* action based on *in rem* principles. In advancing this position, Petitioner has relied, in part, on an isolated, ambiguous statement of a United States Congressman. The comment reads as follows:

> Likewise, we have clarified provisions

> relating to maritime liens against public vessels. Although I felt that we had taken [care] of any uncertainty last year, we have rewritten Section 31342 to clarify once and for all the fact that a claim may not be brought either in personal [sic] or in rem on a maritime lien theory against a public vessel.

135 Cong. Rec. 9184 (daily ed. Nov. 20, 1989).

Based on this confusing statement, one cannot ascertain whether Rep. Robert W. Davis understood the pre-existing substantive law applicable under the MLA, SIAA, PVA and FSIA. One factor, however, that does seem self-evident from a review of the Legislative History, Congress did not intend to make substantive changes to the law. To reiterate, the Legislative History reads as follows: "[t]his section makes no substantive change to law." H.R. Rep. No. 918, 100th Cong., 2nd Sess. 7, (1988). Moreover, the statement relied upon by Petitioner on the 1989 technical revision, likewise, indicates that Congress did not intend any substantive changes.

In 1989, Congress made the technical revision to § 31342 by deleting the phrase "except a public vessel" from § 31342(a). Section (a) permitted an *in rem* action against a private vessel by the provider of necessaries. In making the technical revision, Congress then used similar language (prohibiting an *in rem* action against a public vessel) by adding (b) to § 31342. Section (b) reads: "(b) This Section does not apply to a public vessel."

Petitioner has interpreted section (b) to prohibit *in personam* actions against the United States. In addition to reliance on Rep. Davis' comment, Petitioner has referred to correspondence to the House from the United States Department of Justice. Petitioner contends that this department urged Congress to change the

substantive law in the 1989 technical amendment. However, the comments contained in the legislative history do not evince a clear intent to prohibit *in personam* actions, applying *in rem* principles, against the United States. Rather, the passages extracted from the House Reports merely express some intent to prohibit actions against public vessels but not against the United States *in personam*. For example, in correspondence from the United States Department of Justice to the Chairman of the Merchant Marine and Fisheries Committee, in connection with the 1988 bill, counsel stated:

> Section 31342 should be amended to include the italicized phrase:
>
> > A person providing necessaries to a vessel, other than a **public vessel of the United States or a public vessel of a foreign government**, on the order of a person listed in Section 31341 of this title or a person authorized by the owner—
>
> This would ensure that no claim for maritime liens could be asserted against public vessels (naval, coast guard, etc.) for any reason, in accordance with the Public Vessels Act, 46 U.S.C. § 788 and the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, et seq. Those contracting with the United States to provide necessaries to its public vessels already have in personam right to sue on the contract.

From this correspondence, one could not conclude that there was an intent to prohibit *in personam* actions, based on *in rem*

principles. Although the statement is ambiguous, the passage would seem to recite the existing substantive law — prohibiting *in rem* actions against public vessels. To reiterate, a lien is a pre-requisite to an *in rem* proceeding. Rule C *For Certain Admiralty and Maritime Claims, Federal Rules of Civil Procedure.*

In addition to Rep. Davis' statement on the floor of the House, Petitioner has, in part, emphasized a passage extracted from a House Report, 135 Cong. Rec. 9312 (daily ed. Nov. 21, 1989). The Report reads as follows:

> Section 31342 has been rewritten by deleting the parenthetical provisions relating to excluding public vessels from the application of the existing law and replacing it with a new subsection (b) to assure clarity. This is not a substantive change but simply makes more explicit the long established rule of law prohibiting maritime liens against public vessels. It further clarifies the existing law that a claim may not be brought either in personam or in rem on a maritime lien theory against a public vessel. This Section does not affect a cause of action against the United States based on a valid maritime contract.

Like other passages extracted from Legislative History, this statement is ambiguous. Nonetheless, one cannot read into the statement any indication that Congress intended to change substantive law.

Despite efforts by Petitioner to have the Eleventh Circuit consider this case *en banc*, the court declined. Thus, as the court in *Bonnani* had held, the Eleventh Circuit has adhered to precedent that this Court had set in *Canadian Aviator, Ltd. v.*

United States, 324 U.S. 215 (1945). In other words, a private party may utilize *in rem* principles to pursue an *in personam* claim against the United States. Because there was no intent by Congress in enacting the MCILA to alter substantive law, Respondent properly brought this action against the United States.

II.

THE ISSUE IS NOT "AN IMPORTANT QUESTION OF FEDERAL LAW", AND THUS, DOES NOT FALL UNDER THIS COURT'S GUIDELINES FOR ISSUANCE OF A WRIT OF CERTIORARI.

Respondent respectfully submits that this Court should not grant certiorari in the present case. The issue before this Court is not "an important question of federal law." As a consequence, certiorari is not proper under United States Supreme Court Rule 10.1.

Generally, Rule 10.1 guides this Court's discretionary grant of certiorari. Specifically, the rule states that:

> A review on Writ of Certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> > (a) When a United States court of appeals has rendered a decision in conflict with the decision another

> United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.
>
> 2. The same general considerations outlined above will control in respect to a petition for writ of certiorari to review a judgment of the United States Court of Military Appeals.

Sup. Ct. R. 10.1 (1995). In the present case, the issue before this Court turns upon the application and interpretation of the *Maritime Commercial Instruments and Lien Act* (herein MCILA). First, there is not a conflict between federal circuits or between state supreme courts over this issue. In addition, this

issue concerns a very isolated and infrequently-invoked provision of the act governing the ability of a litigant to bring a cause of action against a vessel of the United States. Consequently, because the issue before the Court does not involve broad constitutional concerns, it does not meet the criteria for certiorari enumerated in Rule 10.1(a), (b) or (c).

A. Rule 10.1(a) and (b) Are Not Applicable.

As a preliminary matter, this Court should recognize that the grounds for certiorari outlined in Rule 10.1(a) and (b) do not exist in the present case. With respect to Rule 10.1 (a), there is no conflict between federal circuits regarding the application and interpretation of the MCILA. Although certain district courts have decided the present issue in a conflicting way, no circuit has adopted a position conflicting with the position taken by the Eleventh Circuit upon this issue. (Petitioner's Petition for Writ of Certiorari, p. 20). *See also, Turecamo of Savannah, Inc. v. United States*, 36 F.3d 1083 (1994). Second, the grounds for certiorari outlined in Rule 10.1(b) also are not applicable. There is no state supreme court decision that is in direct conflict with a federal circuit or other state Supreme Court decision concerning the application and interpretation of the MCILA. (Petitioner's Petition for Writ of Certiorari, p. 20). Consequently, the grounds for certiorari outlined in Rules 10.1(a) and (b) do not exist.

B. Rule 10.1(c) — Important Federal Question

The only alternative ground for certiorari provided for by Rule 10.1 is found at Rule 10.1(c). In particular, certiorari is proper under Rule 10.1(c) when:

> . . . a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be,

> settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. R. 10.1(c) (1995).

According to past decisions of this Court interpreting the language "an important federal question," this ground for certiorari also does not exist in the present case.

The decisions of this Court examining for the existence of "an important federal question," clearly indicate that the issue at bar is not "an important federal question" warranting certiorari. Generally, this Court has reserved its certiorari jurisdiction to important constitutional questions having a national or potentially national impact. *See generally*, 13 Jeremy C. Moore, *et al.*, Moore's Federal Practice ¶ 810.41 (2d ed. 1995) stating:

> If a case raises a genuine and substantial question of constitutional law that has matured, and that question has not yet been considered by the Court, then that case is a candidate for review. . . . Increasingly, the Court has shaped its caseload toward constitutional and related issues).

For instance, in *Miranda v. Arizona*, 384 U.S. 436, 441-442, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), this Court granted certiorari to a criminal defendant who raised constitutional self-incrimination issues under the Fifth Amendment. Further, in *Thompson v. City of Louisville*, 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654 (1960), this Court granted certiorari to a criminal defendant who raised due process considerations pertaining to his conviction of loitering and disorderly conduct. In addition, in *In re Murchison*,

349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 2d 942 (1955), this Court granted certiorari to determine whether the Due Process Clause prevented a judge from presiding in a criminal contempt case when he had previously served as the one-man grand jury in the proceeding in which the charge arose. Further, in *Kolovrat v. Oregon*, 366 U.S. 187, 81 S. Ct. 922, 6 L. Ed. 2d 218 (1961), this Court granted certiorari to determine whether the laws of the State of Oregon or provisions from a treaty between the United States and Yugoslavia should apply to a dispute over land. *See also, Saxbe v. Washington Post Co.*, 417 U.S. 843, 846, 94 S. Ct. 2811, 41 L. Ed. 2d 514 (1974) (certiorari granted to review constitutionality of regulation that prohibited newsmen from interviewing federal prison inmates in non-minimum security prisons); *Gannet Co. v. DePasquale*, 443 U.S. 368, 99 S. Ct. 2898, 62 L. Ed. 2nd 608 (1979) (certiorari granted to review constitutionally under First and Sixth Amendments of order banning press from a pre-trial suppression hearing); *Federal Power Comm'n v. Texaco, Inc.*, 417 U.S. 380, 383, 94 S. Ct. 2315, 41 L. Ed. 2d 141 (1974) (certiorari granted to review a judgment of the D.C. Circuit that set aside an administrative order on the ground that the order amounted to a deregulation of small producers of natural gas and was unauthorized by the Natural Gas Act); *Federal Open Market Comm'n of the Fed. Reserve System v. Merrill*, 443 U.S. 340, 99 S. Ct. 2800, 61 L. Ed. 2d 587 (1979) stating:

> The Federal Open Market Committee has a practice, authorized by regulation, . . . of withholding certain monetary policy directives from the public during the month they are in effect . . . the United States Court of Appeals for the District of Columbia Circuit held that this practice violates the Freedom of Information Act. . . . We granted Certiorari on the strength of the Committee's

> representations that this ruling could seriously interfere with the implementation of national monetary policy").

From the illustrative holdings of this Court cited above, it is clear that certiorari is not proper in the present case. First, the issue before this Court does not involve broad constitutional issues which have a national impact. In particular, the issue before this Court deals principally with a singular provision of the MCILA which governs suits brought against United States vessels. Second, the issue before this Court does not involve matters pertaining to the civil and property rights of individuals. In *Miranda, Thompson* and *In re Murchison,* the issues involved concerned important civil rights of criminal defendants relevant to the national jurisprudence of criminal law. While the issue in the present case may be important in a given context, it does not possess the overriding and blanket importance of the rights of criminal defendants. Finally, as previously discussed, the Eleventh Circuit has held that the issue brought before this Court by the Petitioner simply is not "an issue." In its opinion below, the Eleventh Circuit indicated that the law in this area is relatively well-settled. *Turecamo,* 36 F.3d 1083, 1087 (1994). In particular, the circuit noted that Congress "has expressly stated its intent" with regard to the statute and that "it is inappropriate to second-guess Congress' view of existing law." *Id.* Thus, based upon these considerations, it is apparent that the issue currently under consideration is not "an important issue of federal law" for purposes of Rule 10.1. Consequently, certiorari is not proper in the present case.

CONCLUSION

Based on the foregoing, Respondent respectfully submits that this Court should deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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No. 95-525

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

TURECAMO OF SAVANNAH, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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BEST AVAILABLE COPY

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1. The panel of the court of appeals below specified five analytical flaws underlying the circuit precedent it was bound to follow when interpreting 46 U.S.C. 31342 (Supp. V 1993) and the public vessel exemption to that Section in the Maritime Commercial Instruments and Liens Act (MCILA), 46 U.S.C. 31301 *et seq.* Pet. App. 11a-14a. The panel suggested that, in light of the legal unsoundness of the circuit precedent, the court of appeals should reconsider the issue en banc. *Ibid.*

Respondent claims, to the contrary, that "the law in this area is relatively well-settled." Br. in Opp. 16. As its only support for that contention, respondent quotes a statement by the court of appeals that

"Congress 'has expressly stated its intent'" and "it is inappropriate to second-guess Congress' view of existing law." *Ibid.* (quoting Pet. App. 12a-13a). But Congress's express intent, as found by the court of appeals in the quoted passage, is directly contrary to respondent's view of the law. As the court of appeals noted, Congress intended to *prohibit*, not to permit, *in personam* actions under Section 31342 against the United States based on *in rem* principles. See Pet. App. 12a-13a & n.9.

Respondent attempts to defend the statutory interpretation that was applied by the court of appeals, despite the fact that that interpretation is inconsistent with the statute's plain text, structure and history. The linchpin of respondent's argument is a statement in the legislative history of the MCILA that the 1988 enactment of the MCILA was intended to make "no substantive change to law." See Br. in Opp. 3, 7, 8, 10, 11. Respondent relies on this statement to contend that the MCILA must be interpreted to permit *in personam* actions based on *in rem* principles because of respondent's view that the earlier law permitted such actions. *Ibid.* But the statement in the legislative history that no substantive change was intended was made before the statutory provision at issue in this case was added to the Act. That statement could not have been referring to the statutory language at issue here because that language was not yet in the proposed statute. This point is the first among those listed by the court of appeals as flaws in the statutory analysis of the circuit precedent. Pet. App. 11a-12a.

Respondent's assertions that later statements supporting petitioner's statutory interpretation are "ambiguous" or "confusing" (see Br. in Opp. 7, 8, 10)

are inaccurate. There is nothing ambiguous about the statement that "we have rewritten Section 31342 to clarify once and for all the fact that a claim may not be brought either in personal or in rem on a maritime lien theory against a public vessel," or the statement that "[i]t further clarifies the existing law that a claim may not be brought either in personam or in rem on a maritime lien theory against a public vessel." See 135 Cong. Rec. H9184, H9183 (daily ed. Nov. 20, 1989); *id.* at 30,803. Reversal of the court of appeals' ruling is required in order to vindicate that clear congressional intent.

2. Respondent errs when it states that, prior to the enactment of the MCILA, "a provider of necessaries to a United States vessel had an unquestioned right to pursue an *in personam* action, based on *in rem* principles, against the United States." Br. in Opp. 4. Respondent cites only *Stevens Technical Services, Inc.* v. *United States*, 913 F.2d 1521 (11th Cir. 1990) to support this point. *Ibid.*[1] When the MCILA was enacted in 1988, however, *Stevens Technical* was not yet decided. The MCILA could not have been enacted to codify a ruling made two years after

[1] Respondent also refers to a "longstanding substantive right—to pursue *in personam* actions in accordance with *in rem* principles" and to "preexisting decisional authority" which permitted such actions, but does not cite any authority that authorized such an action in the case of a provider of necessaries to a public vessel. Br. in Opp. 7. Respondent cites, instead, two other statutes that waive the United States' sovereign immunity against certain suits and have been interpreted to permit *in personam* actions based on *in rem* principles. Those statutes do not, however, create any substantive causes of action and do not provide a maritime lien cause of action to a company because it provided necessaries to a public vessel.

the MCILA was enacted. The court of appeals correctly demonstrated that the law in this area was not settled at the time the MCILA was enacted. See Pet. App. 12a-13a.

Respondent suggests that Congress enacted and then amended Section 31342 merely to prohibit *in rem* actions against public vessels, but not to prohibit *in personam* actions based on *in rem* principles. That suggestion makes no sense inasmuch as *in rem* maritime lien actions against public vessels have been forbidden for more than 70 years. See Pet. 20.

3. This case does not present a question of constitutional significance. Br. in Opp. 16. It is, however, a case in which the court of appeals has "so far departed from the accepted and usual course of judicial proceedings" that review and reversal by this Court are warranted. See Sup. Ct. R. 10(a). Despite suggestions by two of its panels,[2] the Eleventh Circuit has declined to give en banc reconsideration to circuit precedent that erroneously interprets a federal statute.

Failure of the Court to reverse the Eleventh Circuit will leave in place a legally unsound interpretation of the MCILA in a jurisdiction that gives rise to a significant amount of maritime activity. The

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[2] In addition to the panel below, the panel of the court of appeals in the earlier case cited as binding precedent by the court below also had expressed dissatisfaction with the law of the circuit. It believed itself bound by an even earlier circuit precedent to permit *in personam* actions, despite Congress' express intent to prohibit such actions. See Pet. 16-17 & n.6; *Bonanni Ship Supply, Inc.* v. *United States*, 959 F.2d 1558, 1563 (11th Cir. 1992). That panel also unsuccessfully suggested rehearing en banc because circuit precedent conflicted with congressional intent. See Pet. 16-17 n.6.

issue in this case, either in the context of the MCILA or its predecessor statute, has reached the Eleventh Circuit four times in the past five years. See *Bonanni Ship Supply, Inc.* v. *United States*, 959 F.2d 1558 (1992); *Marine Coatings of Alabama, Inc.* v. *United States*, 932 F.2d 1370 (1991); *Stevens Technical Services, Inc.* v. *United States*, 913 F.2d 1521 (1990). The Eleventh Circuit's refusal to reconsider the issue en banc leaves no avenue of relief other than reversal by this Court.

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

NOVEMBER 1995